THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES SUSTAINED BY ALIENS ON ACCOUNT OF MOB VIOLENCE, INSURRECTIONS AND CIVIL WARS

I

It appears to be generally accepted that International Law as we know it today had its beginnings in the writings of the political theorists of the latter sixteenth and early seventeenth centuries, more particularly in the memorable treatise of Grotius which appeared in the year 1625. The works of these writers were produced during the period of so-called rationalism when the true historical view had not yet been discovered, and the precedents and examples which were cited in support of the new rules of international law were taken exclusively from Biblical or classical antiquity. Moreover, in this same period Roman law was held in high esteem, a fact which further served to focus attention upon ancient law and custom. It is not surprising, therefore, to find that many principles which had regulated international conduct among European states, especially those of Teutonic character, during the Middle Ages, were either overlooked or rejected. If we remember that these principles had been enforced by an extensive system of municipal legislation, we shall understand why the founders of international law may have regarded them as *res internæ* rather than as matters of international import. Recently, however, the problems to which these very principles were applied have become of increasing international concern and vigorous attempts have been made on the one hand to preserve a sphere of municipal jurisdiction and on the other hand to inject into our international jurisprudence the principles upon which they were based. It shall be my purpose to show the early development of the rules which regulated the question of responsibility for aliens, how they were rejected by the early publicists and what effect they had upon later developments in our international law.

The responsibility of a state for aliens appears in its most rudimentary

form among the early Teutonic nations; not, indeed, in the form of an international responsibility, but either as an individual or a group liability. Very clearly, in the earliest times, the alien, as a clanless individual or outlaw, was without any of the existing personal rights. He had no "wergeld," he was not entitled to the peace and protection of the locality, and if by chance he enjoyed even liberty of person it was only by sufferance and in amelioration of the harsh laws which gave the local lord title over his person, as *ferœ naturœ*. How long these practices survived, we cannot say, but certainly the growth of a *Gastrecht* so common among primitive peoples was not long in superseding the ancient customs. This *Gastrecht*, or rights of hospitality, gave a certain quantum of protection to the foreigner and was exercised more particularly as a form of patronage of a lord over aliens. In its operation it was narrow, for it was confined usually to members of other clans and was not generally applied to the clanless individual. In so far as we may regard this inter-clan relation as having any international significance, it was one of purely municipal sanction.

With the growing consciousness of a political life beyond the confines of the clan came a change in the status of the alien. Thus, as early as the sixth century we find that among the Salic Franks and later among the Ripuarians and the Chamavians there grew up an individual responsibility for the murder of domiciled and transient foreigners. This extension of right, in itself of no little importance, was further strengthened by the principle of royal protection which appears first among the Langobardians. Indeed it was this principle which later became the pivot upon which the rights of aliens were to turn.

The growth of alien rights was not, however, confined to the continent. In England, the Anglo-Saxons early developed both the individual liability for the murdered alien and the protection of royal authority over such individuals. Originally "bote" appears to have been made to the *gildegenossen* and the king in equal shares, but by the time of Cnut II, the royal protection was fully developed. Again in the *Dunsaete*, a species of international agreement between the Welsh and Saxons, we have a mutual responsibility provided for in case of murder of the citizens of one contracting party by the other, this responsibility to be enforced by a system of reprisals.

The relation of early law to our present problem is perhaps not quite clear. *Prima facie*, it would seem that these matters of responsibility for injury and the incident of royal protection were purely within the sphere of municipal law. We must remember, however, that the municipal law of this time had in a certain degree an international significance. It is true that these characteristics were essentially objective, but all subjective international law predicates the objective fundament which is necessary to its existence. This is distinctive of international law in its primitive manifestations, for such indeed it is in all its practical operations and effects.

The protection of the king over aliens was of even greater significance. In its inception it was primarily the exercise of a personal prerogative of the monarch, a right which was assumed to be inherent in him and for which he was rewarded by the escheat of lands of deceased foreigners. Later a great many of these matters of personal privilege came to be regarded as belonging to the sovereignty which was inherent in the royal position. This change in the conception of the source of sovereignty, which may have been due, in some measure, to the influence of Roman law concepts, brought with it a concomitant change in the idea of protection which, like the sovereignty, was henceforth supposed to rest in the people. It is to be noted, however, that this protective function of the sovereignty restricted itself to the passive protection of aliens and only later developed into the more active protection of its subjects abroad. It is to be noted that at this time we are dealing with a right and not with a duty which the protective function later developed into. This was, perhaps, because it was a manifestation more of internal than of external sovereignty, a condition which continued to the time of the early publicists.

The second phase in the development of the law of responsibility is the substitution of a group responsibility for that of the single individual. This change appears to have been general on the continent and in England. In England this was due to the legislation of both Danes and Normans, who seized upon the hundred group as a convenient agency for imputing the liability for murdered foreigners. The responsibility of the hundred was very definitely extended in the reigns of Edward I and Edward III and of succeeding monarchs, to comprehend not merely

injuries to foreigners from certain acts of felonious character, but also damages arising to subjects in general from such acts as well as from riotous assemblages.

On the continent the development of group liability was more or less irregular. In Spain the early introduction of Roman law appears to have inhibited the growth of the Teutonic law, but it was far from reversing all the existing jurisprudence, for the individual responsibility of early Gothic law seems to have persisted even to the present day. In the Empire, Bavaria and Brunswick retained laws of group liability, and in the customary laws both of Germany and France the ancient tribal laws underwent some development, but in nowise was this so well defined as in England. This was not due solely to the differences in political constitution, but to external factors of which the long foreign wars in which the continental countries were almost incessantly engaged were the most important. These wars gradually brought about the old identification of alien with *hoste*, especially in France, which in turn seems to have influenced the Teutonic countries. In the former state, however, the group liability does not seem to have fallen wholly into desuetude, at least in its application to domestic conditions.

With the identification of alien and enemy the time-honored custom of royal protection lost its significance, and in its stead arose the onerous laws of *naufrage* and the *droit d'aubaine* which placed ever-increasing burdens on the alien. The foreign merchant alone appears to have enjoyed protection, and, indeed, chiefly in the Empire. The legislation in the form of market peace and special courts was general in nature and developed independently of the customary law which, by the introduction of the civil law, was falling into disrepute. But the germs of the group responsibility still existed which later grew into the existing systems of France and Germany.

Such, in brief, was the general state in which Grotius found the law. He had before him on the one hand a well-developed system of jurisprudence regulating the status of aliens in accordance with the old Teutonic law; and on the other hand a system which appeared in its general tendencies to be growing in harmony with the legal system for which he stood. Moreover, he seems to have been of the opinion that the whole question of foreign rights was more or less a local problem and

one which was of little international consequence. But there were a few principles in regard to responsibility in general which he laid down as fundamental. These principles which Grotius introduced were based on the old private law concept, that no one was responsible for acts of others unless there were fault on his part. The element of fault might be caused by complicity, by bad counsel or by various other reasons, but most of all by complicity in the face of some act which was not legal. Thus, he says,[1] "a civil community, like any other community, is not bound by the act of an individual member thereof without some act of its own or some omission." He goes on to say, however, that rulers may share in service of others, "by their allowing and their receiving." [2] The former is in cases where the ruler knows of the offense, has the power to prevent but does not: "so that he who could have prevented is held bound if he did not do so, and that the knowing here spoken of is considered as combined with willing, and that knowledge is taken along with purpose, for he is blameless who knows but cannot prevent."

I have already indicated the fact that Grotius looked upon responsibility as a matter of municipal law and for this reason he gave little attention to the question. It is not easy to conjecture to what extent this was true, but one passage may be taken as reasonable evidence in point He says, "Nor if either soldiers or sailors contrary to command do any damage to friends, are the kings liable, which has been proven by the testimony both of France and England that anyone without fault of his own, is bound by the acts of his agents, is not a part of the Law of Nations by which this controversy must be decided, but a point of the civil law. * * *" And again, "* * * the delicts of individuals which regard their own community should be left to that community and to its rules to be punished or passed over as they choose. * * *" But even Grotius recognized the limits of local responsibility. For, says he, "* * * there is not the same power left to them in delicts which in any way pertain to human society in general; for these other states and their rulers may be prosecuted, as in particular states there is a prosecutor of certain offenses which anyone may put in motion; and much less have they such a power in offenses by which another state or

[1] Grotius, *De Jure Belli ac Pacis*, Whewell ed., Lib. II, XXI, p. 342.
[2] *Ibid.*, p. 342.

its ruler are especially assailed; and in which, consequently, the state or the ruler, have, on account of their dignity or security a right of exacting punishment as we have said. This right is not to be impeded by the state in which the offender lives, or its ruler."

I am not prepared to say that Grotius was particularly concerned with the status of aliens when he wrote the above passages. But whatever was his intention, succeeding generations of publicists pounced upon these views, and with but little change they have persisted until the present day. The real significance in the Grotian theory lies not so much in this, as in the fact that he was the first to draw the line of demarkation between municipal and international control of these matters, and thereby set in motion the great conflict between those holding for municipal regulation and those who contend for international regulation of responsibility.

Pufendorf was the first definitely to extend these passages to cases involving injuries to aliens. Close in his footsteps followed Vattel, whose views in these matters, although practically built on the writings of the preceding publicists, are those which appear to have definitely formed the basis of international practice in the early nineteenth century. At any rate, he applied the Grotian principles to aliens even more explicitly than his precursors.

According to Vattel, the sovereign, if he does not prevent injury to a foreigner by his subjects, is not less guilty than if he had committed the act himself. But, as it is manifestly impossible even in the best regulated states for the sovereign to have absolute control over his subjects, it would be unjust to impute to the state every delict committed by the citizens thereof. Consequently, injury by subjects of a state are not necessarily to be regarded as an offense on the part of the state. As it stands, this principle contains a quantum of truth, although I believe that Vattel wished to convey the idea that, *prima facie*, the state would be liable. Advocates of non-liability, however, have extended the meaning of these passages beyond their original significance. Thus Calvo and his apostles have used these arguments to excess, accepting as fundamental truths matters which in reality are only partly true.

This indirect responsibility becomes direct as soon as the state approves or ratifies the act. Such approval makes the individual act a

delict on the part of the state. As for reparation, Vattel, not distinguishing between satisfaction and compensation, believes in an individual responsibility. The state, he thinks, should compel the transgressor to give compensation or should punish him. Failing to do this, the state itself becomes responsible. Apart from this single contingency the state is not liable.[3]

The practical application of these principles was not realized until after the first quarter of the nineteenth century. The reasons for this are apparent. In the first place, there existed in most of the leading European states some local form of group or individual liability, such as the hundred responsibility in England, the communal responsibility of France, or the individual liability of Spain. Such provision for cases of mob violence or insurrection was generally regarded as sufficient. Moreover, it was not until the beginning of the nineteenth century, when the nationals of states were recognized as possessing certain rights and privileges, that nations began to demand with some consistency protection for their subjects abroad. The feeling began to take root and grow, that mere local reparation to the injured alien individual was not actually a settlement of the international prejudice which would be sustained by the injury to the individual, that something more must be forthcoming. Then, too, local justice was not always as favorable in cases of injured aliens as it might be, a fault which international law might remedy. But whatever the reasons were, it soon became apparent that the Grotian-Vattel principles of responsibility were a two-handed sword, wielded in their more extended connotation by the adherents of international responsibility as represented by the claimant states, and just as freely invoked in the more restricted phases by those who believed in non-responsibility. Nor did the contest limit itself to the mere interpretation of theoretical problems, but it became a very active competition between municipal and international law regulation, a contest which has persisted even up to the present day.

II

It is fundamental to our discussion that the character of responsibility in the problems at hand is primarily one at public law. I realize that a

[3] Vattel, *Law of Nations* (ed. Chitty), vol. II, c. VI, p. 161, *et seq.*

private law treatment of the question dates back to the times of Grotius, but this tradition is the more to be deplored when we consider that it is in this very matter where lies the weakness of the Grotian theory. The responsibility of a state for injuries sustained by aliens in civil commotions, never assumes a real character at private law, although at times it is difficult to distinguish the private from the public law aspects. Wherever matters which might give rise to international responsibility are settled by the application of private law rules, and such cases do arise, we may safely say that there has never existed an actual responsibility at international law, although the potentialities for such were present.

Responsibility in its international connotation presupposes the violation of some norm of international law, and at the same time, though less directly, a capacity to violate and to be injured. On the question of to whom and by whom in international law responsibility is imputable rests the truth or fallacy of the public law treatment of responsibility. We know that international law is to be regarded as the totality of rules or principles which governs the mutual relations between states, and that the individual, in so far as his interests are concerned, is only the object of the rights and duties of the state. So, assuming that it is the international duty of a state to protect the subjects of another state, if the former state fails to administer this duty properly it has violated a rule of international law for which its responsibility may be engaged, not, indeed, to the injured individual, but to the state of which the individual is a subject.

Apart from mere treaty stipulations, we may regard as a settled rule of international law the fact that a state has the international obligation to accord certain rights and privileges to the subjects of another state. The international law in this regard is supplemented by the municipal law which prescribes the mutual relation of aliens and nationals. From this double legislation proceeds a double responsibility, one, a responsibility between states, the other a responsibility between state and individual. The dangers of confusing the functions of these two fields of jurisdiction are apparent, and from here proceeds much of the disorder which appears to surround the question of responsibility. But there is yet another great source of confusion arising from the character

of the injury which is the result of the illegal act for which the state is responsible.[4]

The injury occasioned by the illegal act consists more in the character of the act *per se*, than in the result of the act. This is due to the peculiar nature of international law, the fact that its force is potential rather than positive, and, again, from the fact that the injury is usually more a moral than a material injury. The injury itself may be a two-fold violation of right. That is to say, it may be a subjective or an objective violation of right. In the latter case it is a matter of municipal cognizance, in the former of international jurisdiction. States have thought that in satisfying the injury by their own law the other injury, from whence proceeds the violation of international law, has been fully repaired. But this is manifestly impossible. International delicts are not of such a nature that they may be satisfied by local remedies.[5]

From the obligation of responsibility which arises from the injury proceeds the duty of reparation. This duty may be either one of satisfaction or one of compensation. The former is very distinctly a reparation to the injured state, and usually consists in a formal apology or the salutary punishment of offenders or some similar act. Compensation on the other hand is always a money payment. In theory it is an indemnity to the injured state, not to the individual, although in actual practice either method is followed. It is important to note that reparation, no matter in what form it is made, is always to be regarded as the concrete expression of an assumption of liability and can exist only when such liability has been acknowledged. Although the making of reparation may be *prima facie* evidence that responsibllity has been acknowledged, there is no excuse for the statements that "aliens shall receive

[4] Space does not permit a discussion of the illegal act, and its relation to the determinate subjects. These are two elements which responsibility presupposes. The third element is the injury resulting from the illegal act.

[5] It is worth while indicating the peculiar nature of the infraction of an international norm. The violation proceeds primarily from the injury, as I have indicated, and not from the illegal *act* itself. This explains in some measure the fact that, although the injury which gives rise to a violation is in reality objective in character, it is treated as if it were a purely subjective violation of right. This subjective character arises from the dual character of any injury which gives rise to an international obligation. Similarly in municipal law we may have an act which gives rise on the one hand to a civil liability and on the other to a criminal responsibility.

indemnity under such and such circumstances." This is mistaking cause for effect in a way not particularly creditable to the publicist who makes it. Payment of indemnity to the injured individual is *res internæ*, that is, it is a matter which the injured state settles with its injured subject as it sees fit. The mere fact that the parent state is not obligated by any rule of international law to turn over indemnity to its injured subjects would indicate that such obligation can exist only by virtue of its own laws. The distinction between reparation and responsibility is a vital one, and one upon which we must insist if we are to discuss the problem adequately.

So much for the general theory of responsibility. Let us next ascertain to what extent these principles are applicable to cases where responsibility arises in cases of civil commotion. In the first place, we must recognize the fact that there are obligations imposed on a state by international law in regard to the rights and privileges of aliens, apart from their purely conventional status. These rights are of two sorts, absolute rights and personal rights. The personal rights are matters regulated by municipal law. The absolute rights of aliens are regulated by international law, and are not so much rights of the alien *per se*, as they are rights of the state of which the alien is a subject. In their narrowest sense these rights are merely those of being protected in person and property, but the growth of treaty regulation of these matters has greatly extended the privileges of aliens. For our purposes, however, it is sufficient to assume these limited rights.

In so far as the absolute rights of aliens are really an extension of right to the state, we may regard them as being in some measure a recognition, or, perhaps, an expression, of the right which the state has of protecting its subjects abroad. This right is the converse of the duty of protecting aliens, and is as distinctly a manifestation of sovereignty, as the duty of protection is a surrender of these rights. It is for this reason that I am not inclined to regard either one of these rights or duties as an incursion into the fundamental principle of the independence of states. As a general rule, we rarely find a sovereign right abridged that there is not some concurrent extension of sovereignty.[6]

[6] The right of protection abroad depends in a large measure on the intimacy of the relation existing between the state and subject. This relation is regulated by munic-

From its very nature, the right of protection must express itself through the diplomatic channels. Many writers are, therefore, inclined to regard this right as one which should be invoked only in cases of dire necessity, when all ordinary means of obtaining justice have been exhausted, or in exceptional cases which do not admit of municipal settlement. Such an attitude betokens an ignorance of the fundamental character of the contingencies which give rise to responsibility and the invocation of right of protection. We must once more point out that in cases of injury in civil war or insurrection, the violation is not of individual right, but of state right. Obviously situations of this sort are not to be settled by local remedies.

Leaving for the moment the consideration of these questions of obligations and duties, we may consider the question of responsibility of the state for mob injuries as distinguished from injuries the result of insurrection or civil war. Mob injuries to aliens are almost always a distinct injury to the state itself. That is to say, mob outbreaks against aliens are usually motivated by anti-foreign sentiment which is to be regarded as an attack upon the state of which the alien is subject. Such, for example, was the general character of the anti-Italian outbreaks in the United States. The responsibility of the state is engaged more for this reason than for any other, although there is a large class of writers which seeks to attribute to the fault of the government injuries resulting from acts of mobs. This view is not generally maintainable. The most perfect police system is neither omniscient nor omnipotent. Mob violence is from its very nature swift and unexpected, and for this reason, admitting the propriety of a private law concept, it is wrong to impute a fault when one never existed.[7]

But if we admit that, as a general rule, liability is created by injuries to aliens in mob outbreaks, and yet that there is no fault on the part of the state, we are led to the conclusion that there may be a responsibility without fault. It is clear there may be injuries done to aliens without the knowledge of the state and hence without the possibility of the latter preventing such injuries. May we say that under these circumstances

ipal law. From this point of view we may regard the right of protection as a duty as well.

[7] The error has its roots in the Grotian misconception of responsibility.

the state has actually committed a fault? If we accept the view that when the state has used due diligence it is not to be held at fault, there seems to be no reason whatever for imputing such fault to the state, although there still exists the situation where responsibility may be claimed. The Aigues Mortes affair and the Fortune Bay case are examples in point. In both of these cases there was no possibility of claiming that the government was at fault, yet in both instances responsibility was acknowledged and indemnity paid. Responsibility, therefore, in cases of mob violence cannot be said to depend upon the fault or degree of fault of the state, but it proceeds from the nature of the facts in the case.

The problem of responsibility in cases of civil war or insurrection are of infinitely greater difficulty, not only because liability is not always clearly defined, but on account of the many important points of jurisdiction and of sovereignty which are involved.

As a general rule, the stock argument against the presumption of liability is that a state is not bound to accord greater rights to aliens than it would grant to its own subjects. This is the view held by Pradier-Fodéré, Calvo and others. Thus, says the latter publicist, "To admit in this case [internal strife] the responsibility of governments, that is to say, the principle of indemnity, would create an exorbitant and pernicious privilege essentially favorable to powerful states and prejudicial to weaker nations, and to establish an unjustifiable inequality between nationals and foreigners. * * *" [8] To his aid he invokes the principles of independence and sovereignty.

A second ground for non-responsibility is found in the idea that the state is not responsible when the outbreak is the result of *vis major*. This is essentially the view of Fiore, who also adheres to the *due diligence* view.[9] The concept of *vis major* is a doctrine of municipal law which has been transferred to international jurisprudence to enable a state to escape liability where it otherwise would be responsible.

Hall [10] is the chief exponent of the third view in regard to non-liability. It is his idea that the state is not liable on the ground that when an alien

[8] Calvo, *Le droit international*, Vol. III, p. 142.
[9] Fiore, *Le Droit international Codifié* (Antoine ed. 1911), p. 326, *et seq.*
[10] Hall, International Law, p. 231.

settles in a country, he does so at his own risk. He must be prepared to accept the results of civil war, "because the occurrence is one over which, from the very nature of the case, the government can have no control." He is also of the idea that a state is not bound to do more for aliens than for its own subjects. This same theory of risk has been ingeniously converted by the adherents of responsibility in the shape of the so-called *risque êtatif*. This is intended to supplant the theory of fault, and on the theory *ubi emolumentum ibi onus esse debet* the state is responsible for the injured alien. It may extricate itself from this responsibility by proving the fault or negligence of the victim.[11]

Such, in brief, are the three chief arguments against responsibility. Our next inquiry shall be in regard to their actual value as arguments against non-liability.

No nation would be inclined to demand from another nation greater privileges for its subjects residing in the latter state than the nationals of such state themselves enjoy. Nor has it the right, apart from treaty stipulations, so to do. All that it can demand is that its subjects be treated in accordance with the norms of international law. What these rights consist in we have already seen and that a violation of them is an injury to the state, for which the responsibility of the offending state may be engaged, the concrete expression of which is in reparation. This duty, we repeat, is to the injured state, and not to the injured individual. In fact, as we have seen, the injured individual may not receive any part of the indemnity. If he receives indemnity and the nationals do not, this is merely an *incidental* inequality, which cannot be said to have any effect in international law, for, in principle, the aliens injured receive the money from their own state and not from the state where they were injured. The indemnity is part of a relation between state and state and the individual rights are merely objective. This fact would seem to add weight to the view that reclamations should be made through diplomatic channels and that the aliens need not be compelled to settle the matter of reparation themselves by local judicial process.

[11] Apart from these three main arguments against responsibility there are some writers, who, adhering to the theory of fault, believe that it must be met by a civil responsibility. These writers have been led astray by the existence of municipal law regulation of responsibility.

Should they do so, it would appear that they would thereby extinguish any rights which they would enjoy under the protection of their own state. In short, as far as regards the alien individual, a new status is created, but local settlement can in nowise affect the international injury. On the contrary; for the relation between the states would not be affected by a private action in a municipal court, no more than would a civil action in a municipal court bar the right of the state to prosecute criminally.

A civil war as *vis major* is primarily a question of fact. As a rule it is looked upon as the interposition of violence proceeding from human agency of such a character as to be uncontrollable by the entity against whom it is directed. Sometimes it is held to be synonymous with "Act of God." It is in general difficult to look upon civil wars and insurrections as cases of *vis major*, for these are matters from which it is obviously impossible to exclude absolutely the element of will. This doctrine is one to be invoked only in exceptional cases depending upon the circumstances of the case, but these circumstances must be grave and overwhelming. Thus the War of Secession in the United States is a good example of a civil conflict which was generally regarded as a case of *vis major*. Of course, the fact that the civil war itself is not a case of *vis major*, does not preclude certain incidents during the insurrection from being so regarded.

In spite of the certain quantum of truth which exists in the theory of risk both in its individual aspect and in that of the *risque êtatif*, the basic assumption in both cases is wrong, in that it is founded on the question to whom the advantage of an alien settling in a given state accrues, which is not in itself a particularly tenable ground. The alien settling in a country, unless it is known to be in a state of fomentation, assumes no risk. International law has given him the right of protection in person and property by the states in which he is settled, and just as far as this right extends he cannot be said to have assumed a risk.

The *risque êtatif*, on the other hand, is based on the somewhat dubious grounds that an alien settling in a country is a direct benefit to the state. At any rate, we have here the exact condition of discrimination between aliens and nationals, against which so many writers have fulminated. Apart from these considerations, however, a further objection exists in

the fact that its private law character is with difficulty translated into one of public law. This is likewise true of this theory in its individual aspect.

This completes the discussion of the three main arguments against non-liability which I have endeavored to show are dependent upon circumstances. Other theories have been advanced, namely, that the state is not bound to the impossible. *Nemo tenetur ad impossible.* This theory is based on the fiction that in revolutions and insurrections injuries are not to be prevented and that hence the state should not be held liable. This is the old theory of fault in a new coat, which we have already disposed of. It may be mentioned in passing, however, that the problem of responsibility is not to be settled by the mere application of some time-honored legal maxims. Despite the fundamental truth inherent in these principles, to apply them with axiomatic rigidity is a matter requiring great caution.

When and why is the state responsible, and what exceptions are there to these rules? There are two cases in which the liability of a state is practically absolute: first, for its own direct acts, and secondly, for the acts of its agents. The state, as any person at law, is responsible for its own acts. This is a proposition which no one would deny. The responsibility for acts of its functionaries, be these administrative or judicial, rests upon a personal basis, rather than a material one, as in the case of responsibility for acts of private individuals. The relation to the individual concerned rather than the act itself makes the state responsible. Another distinction of importance is the question of responsibility for acts done within and without the scope of an officer's agency. Acts within the scope of an officer's agency, if in contravention to the principles of international law, will be regarded as acts for which the government is responsible. An exception should be made, however, in cases of military commanders when responsibility will be primarily a matter of circumstance, depending on the nature of the acts. The enactment of statutes by which a state denies responsibility for acts of its agents, are without international sanction and are an unjustifiable attempt on the part of the state to extricate itself from its international obligations. As regards acts without the scope of an officer's agency, these can no more give rise to an international obligation than can a

burglary or hold-up. Municipal law should provide means of recovery against such individuals. International complications arise where such legislation is lacking, and not from the acts themselves.

A second class of cases which may engage the responsibility of a state are those for which a government is held liable by the laws of war. These acts, committed by military officers with the sanction of the state, are essentially acts of the state. It is important to note, however, that the government will be liable only for the grosser acts of war.

Whether or not a government is responsible for the acts of rebels is one of the great controverted questions of responsibility. There are two contingencies in which the state is clearly not liable. First, when the insurrection has reached such a serious stage of development that the whole armed force of the *de jure* government is engaged. Thus, in the United States, the great Civil War is to be cited as the best example of this sort. The state, moreover, is not responsible when the belligerency of the insurgents has been recognized. This we shall presently discuss more fully. Apart from these exceptions, I do not think a state may, in general, escape responsibility for acts of insurgents. Certainly, if another state has not recognized the belligerence of insurgents, they cannot address themselves to the organs of the insurrecto government, and must turn to the *de jure* government, which remains the only body charged with the accomplishment of international duties toward foreigners. I do not wish to be understood as laying down these principles as absolute. Insurgents are in no way under the control of the government, and it is manifestly impossible for the *de jure* government to be responsible for all acts of insurgents. A cogent argument for responsibility is the fact that a state may avoid liability for insurgents' acts by simply recognizing their belligerency. But until this is done the insurgents are yet dependents of the government which pretends to exercise authority over them. As regards the acts of war of insurgent forces, the responsibility, as in the case of the *de jure* government, is always a question of fact, but generally speaking is responsibility in the same measure and degree.[12]

[12] The arbitrations of the question will bear me out in this. Despite the great conflict of opinion even here, the general opinion is that there is no escape from liability in the circumstance I have indicated.

The responsibility for rebels which we have discussed is based on the presumption that the rebels are defeated. In case, however, the insurgent government should become the *de jure* government, the responsibility for acts of rebels is clear. The new *de jure* government is responsible not only for its own acts, heretofore the acts of rebels, but also for the acts of the previous government in virtue of the fundamental principle of political science *forma regiminis mutata, non mutatur civitas ipsa.* A new government can never escape liability for the acts of its predecessor, for these are acts of the state which continue despite all reversal in actual form of government.

To these general rules we must make certain important exceptions. In the first place, the state is not responsible when an alien has lost his nationality ("heimatloses" individual). Obviously an individual who settles in a country *sine animo revertendi* is entitled to no greater protection by his former state than the nationals of the insurrected country. Nor would he be entitled to protection when the act by which he was injured was the result of his own imprudence or fault. Treaty stipulations exempting states from responsibility will also exclude reclamations by states whose subjects have suffered injury. There has been considerable discussion regarding the merits and demerits of the treaties, but although they may lack in international expediency, the signatories will be bound to their terms.

We have already indicated that recognition of belligerence of insurgents relieves the parent state of obligations for acts of insurgents. Finally, we may mention the fact that aliens cannot claim protection of a state when they enter a part of country which is notoriously in a state of upheaval or when the *de jure* government has expressly decreed that persons entering such country do so at their peril. The presumption will be when an alien enters a country so conditioned that he has done so from motives of personal gain and therefore at his peril.[13]

So much for the nature of the international responsibility of the state. I believe that I have established the fact that the responsibility of the state is the rule, and non-responsibility the exception. For a long time this principle has been disregarded by states, but the growing intricacy of international relations has brought with it a closer coördination of

[13] The theory of risk enters here.

theory and practice. Some states will doubtless adhere to views of non-responsibility, but a change is inevitable when they come to a realization of the fact that these problems cannot be adequately contemplated by municipal law but must be reserved for public international law cognizance.

III

The fact has already been remarked upon that the problem of responsibility for aliens injured in civil uprisings became of practical international significance only after the first quarter of the nineteenth century. Historically, it may be regarded as an outgrowth of the whole movement for individual rights which culminated in the French Revolution. When states realized that their nationals possessed domestic rights and privileges, they began to insist upon a certain observance of these rights by other states when their subjects ventured abroad, and, *vice versa*, to extend these same rights to aliens within their own jurisdiction. Attempts to apply in practical cases the well developed theories of the early publicists were made during the Napoleonic wars, notably the French Privateer case of 1811,[14] but it was not until the revolutionary disturbances of the thirties that we find cases of significance arising.

The Absolutist excesses in Portugal in the latter twenties and early thirties appear to have included a number of mob outrages on British subjects as presumable adherents of the Constitutionalists.[15] The British Government demanded reparation; the Portuguese Government attempted to equivocate, but threats of reprisal brought a speedy compliance.[16] In the subsequent reconquering of Portugal by the Constitutionalists, there were a number of instances of injury to British subjects, but apparently no reparation was made. The French Government, however, fared better. An expedition under Admiral Roussin was dispatched to the Tagus to demand reparation for injuries to French subjects. The Portuguese were defeated in a naval engagement, and besides losing their fleet were compelled to pay a considerable indemnity.[17]

A more important affair which is indicative of the advanced stand

[14] Moore, *Digest of International Law*, VI, p. 809.
[15] 18 British & Foreign State Papers, 43, esp. p. 103–4, Case of M'Kenna & Munro.
[16] *Ibid.*, 268.
[17] *Ibid.*, 395.

which Great Britain took in matters which concerned the safety of her subjects in foreign lands, was the celebrated Don Pacifico case.[18] The facts are too well known to require more than brief mention. Pacifico, a British subject, residing in Athens, was the victim of mob violence in April 1847. An outburst of anti-Jewish sentiment resulted in an attack on his dwelling by a mob, who were even aided or abetted by the police, to an alleged damage of over £30,000. Pacifico, it appears, presented a claim to the Greek Government, but despairing of having it recognized, appealed to the British Government. A lengthy correspondence ensued. The Greek Government insisted that Pacifico should present his case to a local tribunal, while the British Government was equally certain that it was a matter of diplomatic cognizance. The Greek Government failed to make reparation and a pacific blockade of the Greek coast was instituted. New complications arose as a result. France offered to mediate, and after considerable dispute the matter was arbitrated. Pacifico was allowed 150 pounds as damages for certain claims he had against Portugal, the papers relating to which the mob had destroyed. The Greek Government later paid in cash about two thirds of his original claim.

The Pacifico case was prolific of opinions on the question of responsibility. Palmerston, in a speech before the House of Commons, June 25, 1850, came out squarely in favor of responsibility, but it does not appear that he based his views more upon theoretical grounds than he did on the exigencies of foreign policy. At any rate, his views were those consistently followed by Great Britain in all subsequent cases.

Another case of reclamations against Greece occurred in 1862. The Greek Government acknowledged its liability and promised compensation.[19] The French and Austrian Governments also recovered for injuries to their subjects.[20]

The revolutionary claims against Tuscany and Naples are so well known that no discussion is necessary. For a long time, due to the inaccuracy of M. Calvo's statements, it was supposed that the notes of Schwarzenberg and Nesselrode were the law in matters of responsibility.

[18] 39 Br. & For. St. Pap., 332, *et seq.*
[19] 58 *Ibid.*, 1009.
[20] *Ibid.*, 1142.

The British Government never accepted these opinions in any form and has never acted on them. Nor has any other government, as far as I know, except as it wished to escape liability for its transgressions.

In 1870 a claim by Great Britain [21] was repudiated by Spain on rather technical grounds. One Jencken, in Lorca on professional business, was attacked by a mob and was very severely injured. The pretext for the outrage was some barbarous superstition. The Spanish Government punished the perpetrators, but as to the British claims it pointed out that Jencken had renounced indemnity in the local courts and therefore could see no grounds for making compensation.

This case is interesting in that it seems to indicate that an express renunciation of right in a local court is held to cancel the international claim as well. On the strict grounds of principle this view is not tenable, although as a practical fact it is probably true enough and affords a striking instance of the inconsistency of theory and international practice. Another fact worthy of notice is that none of the cases thus far cited came up squarely on the question of responsibility, but they seemed to turn upon the question of compensation. This is evidence of the rather undeveloped state of the new theory of responsibility which seems to have taken definite shape as such only after the European adjustments in 1870.

Many publicists are inclined to believe that, although the more powerful states are in favor of responsibility when they themselves are making reclamations, when the situation is reversed they hold entirely contrary views. In some cases their views are justified, but this has not been true of Great Britain. The Fortune Bay case of 1878 is evidence in point.[22]

A number of American fishing vessels while fishing on a Sunday in Fortune Bay, Newfoundland, were attacked by native fishermen, who destroyed the boats and nets and expelled them from the bay. The United States demanded reparation on the grounds that they were fishing within the limits and privileges granted by the Treaty of Washington and that local legislation which prohibited Sunday fishing could not abridge their treaty privileges. The British Government took exception

[21] 62 Br. & For. St. Pap., 985.

[22] For. Rel. 1878–81, Correspondence with Great Britain.

to this interpretation,[23] but the United States insisted that, irrespective of the question of treaty interpretation, compensation was due for violence suffered. The claim was finally settled on these grounds.

The German view in regard to responsibility is the same as the British, although it is to be noted that no cases have arisen in which the responsibility of the German Government has been claimed. The so-called Salonica incident was the first case involving the German Government.[24] A number of officious persons had forcibly carried off a Bulgarian girl to prevent her from embracing the Mohammedan religion. The populace of Salonica, enraged at the proceeding, threatened to attack the American consulate, where the girl was hidden.[25] When the excitement was at its height, the French and German consuls appeared on the scene. They were surrounded and murdered.

The German and French Governments demanded reparation. The Turkish Government forthwith admitted its responsibility and dispatched an investigatory commission to the scene. The ringleaders were tried and condemned and the consuls buried with honors. An indemnity was paid to the families. Apart from the fact that the injured parties were both consuls, a circumstance which would not of itself entitle them to any greater amount of consideration than ordinary aliens,[26] the attack was palpably an attack on the consuls, not as representatives of a particular state or nationality, or as foreigners as such, but because they were Christians. This would, perhaps, suggest a further basis for responsibility than has heretofore been mentioned. As a general rule, however, these contingencies are covered by the rules already laid down.

A recent case of some moment involving German rights was the first of the so-called Casablanca incidents. In July, 1907, a number of Europeans employed on a railroad at Casablanca were murdered by Moorish rebels. Quiet was soon restored, but shortly thereafter a French cruiser arrived and, against the wishes of the local consuls, landed a small and inadequate force of marines. The fears of the consuls were realized. A riot broke out and the inhabitants were joined by wild

[23] 72 Br. & For. St. Pap., 1267.

[24] *Staatsarchiv*, 30/333, 33/108.

[25] The American consul was absent at the time. For. Rel. 1876, 569.

[26] Consuls do not enjoy the immunities of diplomatic officers in these matters.

tribes from the hills. The French cruiser opened fire on the town, and when the French and Spanish reinforcing fleets arrived the French vessels continued the bombardment. There was considerable loss of life and property, for the town was practically wiped out.

The German interests in Casablanca were considerable and within a short time the French Government was requested to make reparation for the injuries suffered. The French Cabinet issued a note (10 September, 1907) [27] in which they decided that the Government of Morocco was to be responsible for the murder of July 30, as well as for the injuries resulting from the plundering and suppression of disorders. The indemnities were to be fixed by a commission, and the Minister of Foreign Affairs was charged with the execution of these matters.

This case illustrates what has been said before, namely, that the exigencies of modern international policy are compelling a recognition of the law of responsibility. Certainly in this case it was on account of the extraneous influences upon the responsible government which constrained an acknowledgment of liability. It will be remembered that the events just narrated followed close on the heels of the Algeciras acts. It is doubtful if under different circumstances France would have been as amenable to German claims. Germany's position has been further emphasized by South American and Chinese cases.

Up to the present point in the discussion we have not come to cases of conflict of municipal and international law. In France, where exists an elaborate system of communal responsibility, the interrelation of the local and international law is much closer. The law of communal responsibility in its modern form dates from the days of the French Revolution, although, as I have indicated, it is probably of much greater antiquity. Shortly after the July revolution in 1830, the Court of Cassation declared the law of communal responsibility inapplicable to cities of the size of Paris, and by its decision excluded claims of responsibility from local cognizance. In this particular case a special law was passed to meet the exigencies of the situation. The sum of 2,000,000 francs was placed at the disposal of the government for the settlement of claims arising out of the revolutionary events of that year.[28] It is im-

[27] 54 *Journal de Droit International Privé*, 1257.

[28] 30 Duvergier, *Lois et Collection*, 138.

portant to note that this law was not designated as "*secours*" or aid in the sense in which M. Calvo has understood it.[29] This characteristic of aid applied only to those injured or wounded in defending the cause of the republic. Persons whose property had been injured were to be indemnified by the state.

The indemnifications furnished by France at the close of the revolutionary upheavals of 1848 were also of importance. By a presidential decree of 24 December, 1851, a special fund of 5,000,000 francs was created to settle claims. The decree pointed out, however, that the state was not under a legal duty to do this but was acting in accordance with the dictates of equity and political safety.[30]

After the establishment of the third republic, a very different situation presented itself. Here were losses resulting not only from the Prussian war but also those which were incident to the excesses due to the Communist regime. On the basis of a report by a commission of the Assembly, 100,000,000 francs were voted to be distributed pro rata among the departments. This sum was later supplemented by an appropriation of 120 million and finally by one of 50,000 francs. It is clear that no attempt was made to distinguish between the two types of losses. Nor does any distinction appear to have been made between the claims of aliens and nationals. The only point of interest in the whole affair is that the budget commission expressed itself as having no intention of creating a right to indemnity nor of sanctioning a state debt, although it did distinguish the claims arising from injuries received at hands of regular troops in the reconquest of Paris.[31]

These three cases have been cited, not so much because they are illustrative of any comprehensive development in the theory of responsibility, but because they laid a certain basis for the practice of France in the years following, for, although the general tendency in France even as early as the year 1830 appears to have been to recognize the principle of responsibility, yet, as we have already noted, the question does not seem to have been of any particular moment until after the second half of the nineteenth century. Nor are these cases to be looked upon as

[29] III Calvo, *op. cit.*, 150.
[30] 51 Duvergier, *op. cit.*, 538.
[31] Calvo, *op. cit.*, III, 154.

expressions of republican generosity such as frequently are to be found in successful revolutions. The Privateers case of 1811,[32] the Pastry War claims against Mexico in 1838 and again in 1866, and the Japanese case of 1868 are all evidence of the degree to which France was willing to carry her convictions on the subject of responsibility. Inasmuch as the other cases mentioned will be discussed further on, let us examine the facts in the Japanese claims case of the year 1868.[33]

Free entrance to the harbor of Osaka had been granted to France by treaty. The corvette *Dupleix* was commissioned to make soundings of the passage and for this purpose despatched its steam launch up the coast. The following day came the news that the launch had been attacked by a mob and everyone on board had been killed or had disappeared. Only two men survived the massacre. The consuls of the Powers at once withdrew from Osaka and the French Government demanded an acknowledgment of liability by the Japanese Government. This was immediately forthcoming. "They [the Japanese Government] recognized the fact that our men were exempt from all blame, that the massacre was without possible excuse and that a signal punishment was necessary." [34] The Japanese Government carried out its promises. The offenders were executed, an official apology was read on board the *Dupleix* and an indemnity of 150,000 piasters was paid to the French Government.

We have already seen that a no less determined stand was taken by France in the celebrated Salonica case. And so, too, in the question of claims against Spain for the injuries resulting from the Carlist rebellion of the seventies.[35]

The facts are familiar. Queen Isabella was driven from her throne in 1868 and for the next five or six years Spain was the scene of the worst internal strife. The party supporting Alfonso, son of the late Queen, finally emerged successful. During the revolution, the adherents of Don Carlos had operated in the vicinity of the French border and the injuries to the French subjects in these regions were considerable.

[32] Moore, *Digest*, VI., p. 809.
[33] *Staatsarchiv*, 16, p. 119; *Archives Diplomatiques*, Ser. 1, 33–4, p. 601.
[34] *Staatsarchiv*, 16, p. 121.
[35] *Cambridge Mod. Hist.*, XII, 258.

France requested reparation for the injuries and losses. The Spanish Government, in view of the law of individual liability which existed there, at first refused to consider the request and indicated that the injured parties might sue the perpetrators of the outrages for damages. Settlement was finally made by special law in consideration of a cross-payment by France for the injuries which Spanish subjects had sustained in Algeria.[36]

The Spanish claims against France are worthy of mention.[37] In June, 1881, Spanish colonists settled in South Oran, Algeria, were the victims of the incursions of Arabs. Spain demanded reparation, but M. Barthélemy-Saint-Hilaire, Minister for Foreign Affairs, replied that, although the French Government had reason to follow the events in Algeria with solicitude, in cases of this sort the government had never distinguished between nationals and aliens, and that the latter enjoyed the same benefits from measures of reparation as the nationals. "Measures of reparation evidently could not proceed from a legal obligation." The events in Saida were to be classed among those inevitable happenings to which the inhabitants are exposed, as, for instance, the devastation of a plague, events which could not engage the responsibility of a state.[38] Finally, he pointed out that the Spanish had denied their responsibility for insurrection, on the basis of the same "universally consecrated theory." Nevertheless, he agreed that if Spain would indemnify France the latter would make similar concessions. M. Barthélemy-Saint-Hilaire neglected to mention that France's claims against Spain had not been in accordance with his "universally consecrated theory." The Spanish Government did not avail itself of this inconsistency, however, but, as we have seen, was amenable to the French claims.[39] The present case was clearly one of an eye for an eye, and, for this reason, whatever expressions of principle were made, were not of great importance. In fact, when, in 1893, Brazil availed itself of Berthélemy-Saint-Hilaire's dictum, France protested vigorously and finally compelled payment.

[36] *Archives Diplomatiques*, 1882–3, p. 120; *Jour. Privé*, 1888, p. 293.
[37] *Arch. Dip.*, 1882–3, III, p. 57; I *R. D. I. P.*, p. 177.
[38] *Arch. Dip.*, Ser. 2, Vol. 7, p. 59.
[39] France's share, 900,000 fr. *Arch. Dip., loc. cit.*, p. 71.

A situation similar to the previous one arose in 1893 as a result of the well known "Aigues Mortes Affair." A certain company of Aigues Mortes, a small town near Marseilles, employed a number of Italians in its works. On August 17, 1893, a quarrel broke out between these men and the French employees, which, assuming more and more serious proportions, grew into a veritable pitched battle in which most of the inhabitants of the town participated. Order was restored by the arrival of regular troops, but not until a number of natives had been wounded, and some Italians killed, and 26 wounded. Although extensive investigations were carried on, the blame was not to be fixed on any one party, but the basis of the whole trouble appears to have been that the company employed a preponderating number of Italians.

The day after the riot the Italian ambassador presented his remonstrances to the French Government. Deep regret was expressed, but nothing appears to have been said on the subject of reparation. But before proceeding to discuss this problem, let me briefly review the events in Italy following the riot at Aigues Mortes.[40]

The disturbances in Italy were confined chiefly to hostile demonstrations against the French in Rome, Naples and Genoa. In Rome a mob collected before the French embassy and, in spite of the resistance of the police, hurled stones and blazing paper through the windows of the palace. In Naples and Genoa the mobs attacked the consulates and French business houses and the cars of the French tram line were derailed and burnt.

The Italian Government was the first to claim liability. It informed the French Government that reparation by France would be complete when a just indemnity had been paid. Previous to this despatch, however, the French Government had of its own accord offered to indemnify Italy. No mention of non-responsibility was made and the offer was accepted by Italy.[41]

The French claims amounted to 50,000 francs and were examined first by a joint commission which, however, dissolved without coming to any conclusion. The matter was finally settled through the regular diplomatic channels.[42]

[40] *Ibid.*, p. 173; *Arch. Dip.*, Ser. 2, Vol. 49, p. 37 *et seq.*

[41] Amount of 420,000 fr.

[42] *Archiv. Dip., loc. cit.*, pp. 47–8.

The Aigues Mortes affair is one of the most notable cases of recent years, and is especially to be remarked upon for the fact that there was no talk of a "universally consecrated principle" or "spontaneous liberality." The case is not to be explained, certainly, on the grounds of international equity alone, but may be said to have been in some measure the result of the delicate European situation existing at the time.

Since the Aigues Mortes affair, France has been involved in a number of minor cases which raised the question of responsibility. The most important of these was the Barcelona riots case of 1909, which, by the way, is one of the most recent cases in which the question of responsibility has been raised.

It will be remembered that the riots of 1909 were brought about by the popular dissatisfaction with the government's Moroccan policy. Attempts to mobilize troops resulted in strikes, riots and insurrections and all the accompanying excesses of mob passion. This was most particularly the case in Barcelona and Catalonia. The uprisings were finally quelled, but only after considerable loss of life and property had occurred.

The French losses had been especially heavy in Barcelona. A monastery had been destroyed for which France claimed indemnity of 87,379 pesetas. A similar sum was demanded for another outrage of the same sort. Besides this there were six other minor claims entered.[43] We have already spoken of the Spanish law of individual liability in cases of this sort. As a rule this law had been supplemented by special act, as in 1881, where the claimants were not otherwise to be satisfied. Leaving out of consideration the question of international injury which was involved in these cases, it was palpably impossible for the injured parties to recover in the present case, for the Barcelona insurgents were laborers or insolvents from whom nothing could possibly have been collected. During an interpellation of the Minister for Foreign Affairs on December 24, 1908, in this matter, M. Pichon, the Minister, said the following significant words:[44] "That, as has been already shown, there exists no international jurisprudence in regard to the responsibility of states where events occur in civil or political trouble. The law varies with the state, certain states recognize responsibility, others do not."

[43] *Jour. Pr.*, 37, 1139.

[44] *Ibid.*, 1140.

In September, 1910, the Spanish claims were still in the diplomatic channels and, as yet, there has evidently been no settlement.

Let these cases of responsibility in which French interests have been involved suffice for the present. Clearly, France has taken a position favorable to responsibility and in only one case, the Spanish claims of 1881, has shown a tendency to recede therefrom. This view of the French Government is, as we have seen, in accordance with that adopted by both Great Britain and Germany. Other European states have likewise sanctioned the same principles, notably Italy and Spain. The position taken by Italy in the Aigues Mortes affair has been consistently maintained in most of the cases where she has claimed responsibility or it has been claimed of her. In 1906 [45] an Italian soldier belonging to the Italian force occupying the Island of Crete was injured at some election troubles and later died. The Italian representative ordered the occupation of the region where the killing had occurred and claimed an indemnity, to which end he ordered the sequestration of customs revenues in the region under Italian control. The Cretan Government gave way to this rather extraordinary pressure and paid an indemnity of 20,000 francs.

Spain, on the other hand, has not been as decisively in favor of the view as the other European states, but upon several occasions where Spanish citizens have been injured in the Americas, Spain has expressed herself emphatically for responsibility.

An interesting situation exists at present between Spain and some of the European Powers. In 1912 England, France and Germany presented claims amounting to over 100,000,000 francs for injuries sustained by their respective subjects during the various Cuban insurrections.[46] Previous to this and shortly after the Hispano-American war, similar claims had been presented, but Spain had declined to entertain them, on the ground that no nation could be obliged to indemnify except for the acts of government troops. The situation was peculiar in Cuba, for most of the outrages and excesses were those of insurgents with whom the regular troops had been unable to cope. Subsequently, the three governments presented claims to Cuba, but at the same time insisted

[45] 13 *R. D. I. P.*, p. 223. The soldier was evidently not on duty.
[46] 39 *Jour. Pr.*, 675.

that Spain should share the responsibility because of the impossibility of distinguishing the acts of regulars and insurgents. Since then, the claims have again been presented to Spain, but no action has as yet been taken.

We have yet to consider two cases involving Russia which would indicate that, despite the progress which has been made in the theory of responsibility, there is still some basis for the contention of M. Calvo that the theory favors the strong and is prejudicial to weak nations.

In 1905, Switzerland made claims of Russian responsibility for injuries received by a Swiss subject in the Russian disorders of that year. The Russian Minister for Foreign Affairs replied as follows:

> The Imperial Government cannot assume the liability for the indemnification of the Swiss citizen injured. In short, injuries of this sort occasioned either by individuals or bodies of individuals should be reimbursed by the persons recognized as the guilty parties by competent judicial authority. It is generally understood that this principle does not exclude the responsibility of functionaries who might be convicted for neglect of duty, in regard to the suppression of disorders. Consequently, the aliens injured have full and entire right of instituting actions against each individual or official whom they believe to be guilty, without the Imperial Government as such guaranteeing indemnification to injured aliens. In view of these ideas, the latter cannot pretend to enjoy privileges Russian subjects themselves are not entitled to.[47]

The Russian Government clearly was inclined to regard the subject of responsibility as within the field of municipal cognizance rather than as a matter of international law, at least as regards claims made against herself. The exact opposite of this view appears to be maintained as regards injuries to Russian citizens. The following quotation from the *Journal Privé* will illustrate the point at issue.[48]

> The Prince Salar-ed-Daouleh, who occupied new Kermanchah, paid at the request of the consul of Russia 7000 tomeins as indemnity to Russian subjects for injuries sustained by them during the disorders in that city.

Fortunately for the theory of responsibility, cases of this sort are decreasing in number. States can no longer freely repudiate liability. Responsibility has become in Europe a recognized fact of international

[47] 1905 *Rapport du Conseil Fédéral*, p. 300.

[48] 39 *Jour. Pr.*, 686.

law, and states are gradually coördinating theory and practice to an ever-increasing extent. During the last quarter of a century a mass of precedents has been accumulating which point to a theory of responsibility, and, after all, it is these precedents and the practice of states which is the determining factor as to what is and what is not international law.

IV

We have seen how in Europe there has been a steady progress during the last half century toward a theory of absolute liability for injuries sustained by aliens in civil commotions. Most of the cases we have mentioned, however, have been among the European nations themselves and chronologically have been rather remotely separated. Turning to the countries of Latin America, we are confronted by a new situation. Here, uprisings and insurrections are of such common occurrence that to a large school of publicists and jurists it has seemed impossible to hold a state responsible for the injuries which aliens are constantly subjected to. These writers have attempted therefore to develop a scheme of non-responsibility which will meet the exigencies of the turbulent situation in these countries, and have attempted to justify their view both theoretically and on the basis of international precedent. We have already examined the theoretical arguments which they advance, and it yet remains for us to inquire into the cases which have arisen.

The movement, in Latin America, toward non-responsibility has not been confined to publicists and jurists alone, but has been repeatedly voiced by prominent statesmen of those countries. And this they have had ample opportunity to do. The number of revolutionary uprisings in the South and Central American states has been truly remarkable. Nor are these outbreaks to be looked upon as frivolous and sporadic in character. Many of them have been conflicts of great moment and have affected important interests. The flagrant disregard of life and property so common in these states has justified the European governments in adopting vigorous measures, and confirms to some extent the view which they have taken that the Latin American states have not yet such a degree of political development as to trust the destinies of foreigners in

their hands. At the same time, however, we must not forget that many nations have abused their position, and have availed themselves of the thunderbolts of diplomatic intervention when there was little or no excuse for their so doing.

The claims which are most frequently made against the Latin American states are conveniently divided into three classes. First, claims made for injuries arising from acts of oppression, unjust imprisonment or mob violence. Secondly, claims for injuries sustained during civil wars and insurrections. Thirdly, claims for violations of contract obligations. It is with the first two classes alone with which we shall have to do.

The Latin American states have shown considerable ingenuity in devising schemes to avoid liability for injuries to aliens. But to all appearances these have been of no avail. They have repudiated the theory of responsibility not only in their diplomatic correspondence, but in their statutes, their treaties, and even in their constitutions. From a purely political point of view, the position of the Latin American states may be regarded as a protest against indiscriminate intervention by European states. It is an effort, moreover, to maintain the privileges of equality of states and the inviolability of territorial sovereignty. From the juridical standpoint, however, we see in this attempt at repudiation of the theory of responsibility, a final effort to regulate the liability of the state by municipal legislation. This in turn may be in some measure understood as a heritage of the mother country which, in the course of development, has taken a new direction.

Although it is the purpose of the present paper to study merely the international aspects of the question of responsibility, yet the interrelation of municipal law and international law is so close in these states that it becomes necessary for us to consider to some degree the extent and effect of these municipal measures. Let us consider, in the first place, the constitutional provisions.

In general, the constitutional provisions are of three sorts: those which repudiate responsibility, those which deny the right of diplomatic intervention and, finally, those which insist that alien parties contracting with the government shall not resort to diplomatic intervention. Taken up in their existing chronological order, the earliest of these constitu-

tional provisions is in the Costa Rican Constitution of 1871 which provides merely, that aliens and nationals shall seek redress for injuries or damages before the courts.[49] This provision was rather general in nature and was evidently not aimed at diplomatic intervention alone. In contrast to it, however, we have the provision from the Guatemalan Constitution of 1875 which provides that [50] "neither Guatemalans nor foreigners shall have indemnification for damages arising out of injuries done to their persons or property by revolutionists." This is evidently the first constitutional denial of the right of aliens to claim responsibility for injuries. It was followed in 1886 by the Salvadorean Constitution, which has a similar provision, and further stipulates that no compact shall be entered into modifying the constitutional provision.[51]

The Haitean Constitution of 1889 [52] likewise limits the right of reclamation and gives the victims of revolutions the right to sue at law for damages. The Honduras Constitution of 1904 [53] also is positive on the matter and even goes to the extent of providing for the expulsion of individuals who fail to observe the provisions of the Constitution. The Honduras Constitution was closely followed by the Nicaraguan fundamental law of 1905 which has in effect identical provisions.[54] Finally, the Venezuelan Constitution of 1909 [55] has incorporated similar provisions, provisions which it has embodied in its Constitution for the last generation.[56]

Another type of constitutional limitations may be found in the Constitutions of Ecuador,[57] Colombia,[58] Paraguay,[59] Cuba,[60] and Panama.[61] These take the form of stipulations that aliens shall enjoy the same civil

[49] Rodriguez, *American Constitutions*, Vol. I, p. 332, Art. 46.
[50] *Ibid.*, p. 238.
[51] *Ibid.*, Art. 46, p. 268.
[52] *Ibid.*, Art. 185, Vol. II, p. 85.
[53] *Ibid.*, Art. 14 & 15 Vol. I, p. 362; Art. 142, p. 388.
[54] *Ibid.*, I, pp. 301–2.
[55] Mss. kindly furnished me by Pan American Union.
[56] So 1904 and 1901 and 1891.
[57] Art. 37, *Ibid.*, Vol. II, p. 283.
[58] Art. 11, *Ibid.*, Vol. II, p. 321.
[59] Art. 33, *Ibid.*, Vol. II, p. 388.
[60] Art. 10, *Ibid.*, Vol. II, pp. 144–5.
[61] Art. 9, *Ibid.*, Vol. I, p. 394.

rights and constitutional guarantees as nationals. The Constitution, while apparently granting rights to aliens, at the same time by the doctrine of implied powers denies them other rights, for clearly, if nationals have no right to make reclamations, certainly aliens have not either.

In connection with this discussion of constitutional provisions, it is a fact worth noting that these constitutional limitations are to be found in those countries which more than any others have been subjected to almost continuous reclamations by foreign states. None of the Latin American countries which we generally consider as maintaining a more settled political life, have embodied rules of this sort into their Constitutions. It is true, however, that some of these nations have had recourse to other methods, notably statutory and treaty stipulations. Let us briefly consider some of the more important of these laws and decrees.

A great number of statutory provisions has been the direct result of some civil war. More particularly has this been true of Venezuela and Colombia. The former state was one of the first to resort to this *modus operandi*. In 1873, at the close of the memorable revolution in Venezuela, the reclamations of injured aliens were so numerous, that in a vain attempt to deny its responsibility the Venezuelan Government issued a decree that:[62]

> neither domiciled foreigners nor wayfarers have the right to resort to diplomatic channels, unless when, having exhausted legal resources before the competent authorities, it may clearly appear there has been a denial of justice or notorious injustice.
>
> Foreigners do not possess the right to demand indemnification from the government for the losses or injuries proceeding from the war, except in such cases as Venezuelans possess it.

It must be noted, however, that a further decree modified the manifest severity of this law and gave to claimants a fairly wide latitude of reclamation. But, despite this fact, the Venezuelan decree is a landmark in the history of responsibility, for, as I have said, it is one of the first forceful and outspoken repudiations of responsibility in statutory form. Four years after the issuance of this decree, the Colombian Government passed a law regulating the same question.[63] It is true that it was slightly

[62] 74 Br. and For. Stat. Pap., 1065.

[63] 68 *Ibid.*, 776.

more liberal, in that it recognized certain claims proceeding from injuries by revolutionists, but made these claims cognizable only by local courts. Foreigners' claims were not to be treated as claims of foreigners as such, except in respect to deprivation of property.[64] The British Government made a vigorous protest against this law in a note addressed to the Colombian Government on January 3, 1878 [65] and as a result a new law was passed, July 1878, giving administrative authorities the jurisdiction.[66] This law was further amplified by decree.[67]

Another important series of statutes was enacted in Colombia in 1885, following another uprising. Strangely enough, the first decree recognized the fact that the problems arising out of this civil war were ones which gave rise to international responsibility. The claims of foreigners were given into the hands of a mixed commission.[68] A supplementary decree [69] of 1886 stipulated, however, that the government was not necessarily responsible for losses sustained by aliens at the hands of rebels. In the following year came another amendment which apparently sought to limit the responsibility of the government for the acts of the officers of the *de jure* government as well. This decree enumerated the acts of officials for which the republic would hold itself liable, but denied responsibility for the same acts when committed by the rebels, except where responsibility was found to be recognized by international principle or was found to be the practice of the civilized world.[70] In view of the cases which we studied, it would appear that this latter phrase completely nullified the preceding provisions.

During these years other states, notably Salvador, Costa Rica, Mexico and Ecuador, enacted comprehensive legislation regulating the status of aliens. In the main, these provisions were very similar to the constitutional provisions which we have already examined. The Salvadorean law,[71] which put aliens on a footing with nationals and denied the right

[64] 68 Br. and For. Stat. Pap., p. 778.
[65] *Ibid.*, p. 776.
[66] 69 *Ibid.*, p. 376.
[67] *Ibid.*
[68] 76 *Ibid.*, p. 566.
[69] 77 *Ibid.*, p. 807.
[70] 78 *Ibid.*, p. 53.
[71] 77 Br. & For. Stat. Pap., p. 121.

of diplomatic intervention, was protested by both Great Britain and the United States.[72] The United States insisted that the question was one of international law, and that furthermore decisions of national tribunals did not bar international remedy. The Salvadorean authorities did not attempt to maintain the position aimed at, but declared that the law referred "only to claims which have their origin in acts of the judicial authorities and not to claims that are founded upon an anterior act of the gubernative authority." [73]

A not dissimilar controversy arose over a Costa Rican law promulgated in the same year. The law, which was in its essentials the same as the Salvadorean, was again protested by the United States. It was pointed out, that "a municipal law excluding foreigners from having recourse to their own sovereign to obtain for them redress for injuries inflicted by the sovereign making the law, has in itself no international effect." [74] The United States insisted, moreover, that it had a right to claim when it saw fit to do so.

The Mexican law of this year had identical provisions to those of the other countries whose laws we have considered. No protest was made against these provisions.[75]

The law in Ecuador, at first fairly liberal, in that it vested the government with discretion to recognize certain claims for equitable reasons,[76] was stringently amended in the year 1888, following a civil war. The government refused to be responsible either for acts of insurgents, or for the military operations or acts of repression and measures of security resorted to by the government.[77] This decree aroused considerable disapproval in the diplomatic circles. The diplomatic corps protested in a collective note to the Minister for Foreign Affairs on August 29, 1888, informing him that pending instructions they would act on the principle that the international law of a state could not alter the principle of international law to the prejudice of aliens.[78] When the Presi-

[72] 77 Br. & For. Stat. Pap., p. 116.
[73] For. Rel., 1887, p. 114.
[74] *Ibid.*, 1887, p. 99.
[75] 77 Br. & For. Stat. Pap., p. 1270 *et seq.*
[76] *Ibid.*, p. 728.
[77] 79 *Ibid.*, p. 731.
[78] *Ibid.*, p. 166.

dent communicated this note to the Chambers, they refused to modify or amend it in any way. The President resigned but his resignation was not accepted.[79] Four years later, the Ecuadorean law was changed.[80] The new law did not attempt to deny the responsibility of the government for official acts but it limited liability to such cases alone. Diplomatic recourse was not expressly denied, but aliens were forbidden to resort to methods not open to nationals.

In 1893, a comprehensive law was enacted by the Guatemalan Congress,[81] one whole section of which (Sec. VI) was devoted entirely to the question of diplomatic intervention. Liability was limited to acts of officials and diplomatic recourse was to be allowed only in cases of denial or of delay of justice. A similar law slightly more attenuated was passed in 1895 by the Honduranean Legislature.[82] But neither this nor the previous laws were protested. In fact, experience proved that most of these laws were impracticable in operation. At best they were to be looked upon as an expression of governmental policy which would be carried through if possible, but, if not, the administration would be willing to recede.

A situation of this sort existed in 1903 when Venezuela attempted a statutory regulation of the matter.[83] This law was merely an incident in the existing movement to escape liability for the civil war of the previous years, which culminated in the pacific blockade. The right of reclamation was limited as in the other statutes which we have examined. The article relating to diplomatic intervention is interesting, and is worth quoting.[84] It provided:

> That neither domiciled foreigners nor those in transit have the right to have recourse to diplomatic intervention, except when legal means having been exhausted before competent authorities it is clear that there has been a denial of justice or a notorious injustice has been done, or that there has been an evident violation of the principles of international law.

It is evident that the apparent rigidity of this law is qualified by the

[79] For. Rel., 1888, p. 491. Nothing further is noted.
[80] 84 Br. & For. Stat. Pap., p. 644.
[81] 86 *Ibid.*, p. 1281.
[82] 87 *Ibid.*, p. 703.
[83] 96 *Ibid.*, p. 647.
[84] Art. 11, *Ibid.*, p. 648.

last phrase. For, what is a violation of international law, if injuries to aliens in civil war are not? And who, indeed, are the judges in this matter? Certainly not the officials of the country making the law. This was perhaps the feeling of the diplomatic corps at Caracas, which met to discuss the question of remonstrating. No decision was reached by them and apparently the matter was dropped.[85]

A new type of statute appeared in the year 1908 [86] which, although it does not expressly deny liability or the right of diplomatic intervention, insists that no treaty shall be signed which seeks to place foreigners in a better position than the nationals themselves enjoy. Moreover, it directs that treaties shall limit the right of diplomatic intervention by describing the bounds in which diplomatic officers may act, and that endeavor shall be made to introduce into such treaties the principle of non-responsibility.

Apart from any argument as to the merits of treaty stipulation of this sort, it seems strange, that, in the face of general international opposition, Salvador should have passed a law of this sort. If, however, we regard this statute as a final stand of the theory of non-responsibility, we can at least explain if we cannot justify its existence.

These laws must suffice us for our study of statutory regulation of the question of responsibility. As I have said before, these statutes have been purposeless as far as any practical effect has been concerned. Both the European states and the United States have expressed grave disapproval of these acts, a disapproval which on various occasions has taken the shape of formal remonstrance. To such the Latin American states have invariably been amenable, but they stand as a man by the right which they declare they possess, namely, to regulate as they see fit the question of responsibility. This leads us to the mention of the movement for a so-called American international law, especially as it has found expression in the acts and minutes of the various Pan-American Congresses.

At the first Pan-American Congress held in the year 1890,[87] the committee on claims and diplomatic intervention recommended that resolu-

[85] For. Rel. 1903, p. 806.

[86] *Ibid.*, 1908, p. 706. This is the first statute of the kind which I have found. It is possible that similar ones preceded it.

[87] International American Conference Repts. of Committees, Vol. II, p. 233

tions be adopted to the effect that foreigners were entitled to equal rights with nationals, but that beyond this no nation had any obligations or responsibilities. This is the familiar equality doctrine which we have already examined and found wanting. The projected resolutions received the unanimous support of the delegates with the exception of those of the United States. Mr. Trescot, the United States representative, pointed out that to adopt these principles would be to exclude absolutely diplomatic reclamations and that cases of this sort were better handled by tribunals unaffected by the partialities and prejudices of municipal courts.

At the second conference,[88] the question came up and found expression in a number of resolutions. A convention was finally adopted which, predicating the doctrine of equality, came out squarely for a system of non-responsibility except where officials failed to comply with their duties. Alien claims were to be presented to the local courts alone, and diplomatic recourse was to be had only in case of denial or delay of justice, or when there had been a manifest violation of the principles of international law.[89] At present, all the states represented, except the United States, have become signatories to this convention.

Prima facie, it would appear that these rules would put an end to all diplomatic recourse, but this is not in reality the case. It will be observed that a reservation was made of all manifest violations of international law. This convenient phrase will permit of almost any latitude of interpretation as, for instance, was the case in Salvador in 1887. It is difficult to comprehend how these conventions will alter in any material way the practice even of the signatories.

The problem of pecuniary claims was further settled by a convention which provided that they were to be submitted to arbitration when of sufficient importance and when they could not be amicably adjusted through diplomatic channels. As was pointed out in the third congress held at Rio de Janeiro, this stipulation precluded all but the claims of major importance from being settled in the way suggested.[90] The United States ratified this convention.

[88] *Actas y Documentos de la Segunda Conferencia*, p. 830.
[89] *Ibid.*, p. 854.
[90] Third Int. Am. Conf. Minutes, etc., p. 181.

A criticism of this movement may not be out of place at this point. Although from many points of view an attempt to formulate more definitely an "American" international law is highly laudable, yet it is to be condemned if it has as its mission the subversion of principles which have repeatedly received the sanction of the great Powers. To build up a legal system which is in direct conflict with the existing customs and precedents may prove in its consequences a destructive instead of the constructive force which it pretends to be.

A point which may have been noted and which is of some importance is the fact that the movement among the Latin American states in so far as it affects the problem which we are studying has been essentially objective in character, that is to say, efforts have been directed more against the method of presentation of claims than against the problem of responsibility itself. I think this is due in large measure to the way in which most states have comprehended the whole question, a fact which leads to no little confusion and inaccuracy. This stands out even more clearly in the treaties which Latin American states have concluded in their attempt to divest themselves of responsibility.

The earliest treaty may be traced to the year 1863 (Bolivia and Peru).[91] This treaty, although it antedates the efforts at constitutional limitation of liability, was not the first attempt at regulation. In 1852 the Venezuelan Government, in connection with a proposed modification of American public law, had included a provision by which claims of foreign governments for injured individuals would not be received. To pave the way for an *entente* on this subject Señor Guzman was sent to various capitals, but apparently the proposal did not materialize.[92]

Other treaties soon followed the treaty noted above. It is not my purpose to discuss or to enumerate these provisions inasmuch as this was ably done by Mr. Harmodio Arias in an article in this JOURNAL for October, 1913, page 724. The list which is there given is complete but for the addition of a treaty between Italy and Paraguay, August 22, 1893, Article 3,[93] and Bolivia and Chile, May 18, 1895, Article 5.[94]

[91] 55 Br. & For. St. Pap., p. 837.
[92] 4 *R. D. I. P.*, note, p. 227.
[93] Martens, *Nouveau Recueil Général de Traités*, ser. II, Vol. XXII, p. 50.
[94] *Ibid.*, Vol. XXIV, p. 396.

We have already seen that the Institute of International Law in its 1900 meeting expressly condemned this sort of treaty-making and in the rules which it drew up it recommended that states refrain from such practices. This was a very serious condemnation of the Latin American movement, and, coming as it does from foremost publicists, indicates that there is a total lack of international precedent upon which such treaties might be based. We do not, however, condemn the latter solely for this reason, but because they are aimed at the subversion of an important international principle. It is true that they affect primarily only the contracting parties, but the moral influence which such treaties may exert is certainly considerable. For example, two states might agree between one another not to prosecute acts of piracy which subjects of one state might inflict on the other. Certainly, the fact that such an agreement was limited to the signatories would not neutralize the demoralizing effect which the treaty might have not only upon international jurisprudence but upon the whole civilized world. So it is with the theory of responsibility. It is true that these treaties have in many instances proven of no practical effect, but the tendency is none the less dangerous and might pave the way to a discreditable practice among states.

We turn next to the international practice of the Latin American states as it has been illustrated in the almost overwhelming number of cases which have arisen. We must perforce confine ourselves to the leading cases which have been of distinct constructive value, keeping in mind the points which have already been noted.

With the exception of the celebrated "Pastry War" between France and Mexico, none of the cases prior to 1850 are of any value to us, for it is only with the second half of the nineteenth century that the questions of responsibility reached the dignity of international conflicts, and it is only then, moreover, that the Latin American states began a more concerted and purposeful resistance to the theory of international responsibility. Let us briefly examine the Pastry War case.[95]

Like other Latin American countries, Mexico since her independence had been prey to continuous insurrection during which considerable losses had been sustained by foreigners, more particularly by French

[95] 27 Br. & For. St. Pap., p. 1178; H. H. Bancroft, Works, Vol. 13, p. 187.

subjects. The basis of the relations between France and Mexico was a provisional treaty which had never been signed by Mexico, and for this reason no attention was paid to French demands. France finally made a peremptory demand for an indemnity of 600,000 francs,[96] but this was refused and accordingly diplomatic relations were severed and Mexican ports declared to be under blockade. This procedure did not bring Mexico to terms. Reinforcements were sent and, following an unsuccessful conference, Vera Cruz was bombarded and abandoned by the inhabitants. At this point Great Britain offered to mediate, and the two contendants agreeing, a new conference was held. France did not, however, follow up her advantage but accepted practically the same conditions which had been previously offered her by the Mexican Government.[97]

During the course of the dispute, an interesting doctrine was aired by the Mexicans. They declared that [98] "We are a nation always agitated by revolutions; as such we suffer all the consequences of a state of revolution, popular tumult, robberies, plunderings, assassinations, unjust decrees, and since we are obliged to suffer all these evils, we consider that the foreigners who may be in our country must suffer like ourselves, without a chance of redress or compensation." However anarchistic this confession of faith may appear, it is not an isolated expression of opinion. It stands as the most candid and concise statement of the principle which the Latin American states are forever reiterating.

In the year 1856 an important case known as the "Panama Riot Case" arose between the United States and the Republic of New Granada.[99] The outbreak arose as the result of a quarrel between a railroad passenger and a negro vender. The negro's companion shot among the passengers, a mob collected and attacked the travellers and they were even joined by the police. The mob was dispersed only after many passengers had been killed.

The case was finally decided by arbitration, which was provided for in a convention signed September 10, 1867, in which the Government

[96] 27 Br. & For. St. Pap., p. 1178; H. H. Bancroft, Works, Vol. 13, p. 187.
[97] 27 Br. & For. St. Pap., p. 1186 ff.
[98] *Ibid.*, p. 1176.
[99] Moore, History and Digest of International Arbitrations, Vol. II, p. 1362.

of New Granada acknowledged "its liability arising out of its privileges and obligations to preserve peace and good order along the transit route." [100] The case was not settled, as is generally supposed,[101] on the basis solely of the treaty stipulation. General Herran, the envoy of New Granada, pointed out that this was an extraordinary liability of his government based not alone on treaty stipulation between the countries but on a principle of international law as well.[102]

It is interesting to note that in the next dispute over the rights of foreigners, Mexico was again involved. This was the celebrated triple intervention of the years 1861–2. The facts of the case are familiar. British claims were based not only upon demands of indemnity for injuries sustained by some of her citizens during long series of disorders, but also included important claims for funded debt and a large sum of money stolen from the legation.[103] Spanish claims were based mainly upon recognition of claims by a previous convention, whereas French intervention was solely to recover for bonded indebtedness of Mexico.[104] The existing government refused to recognize the acts of its predecessors and, after protracted diplomatic wrangling, relations were severed and a joint intervention was decided upon. A convention was signed October 31, 1861 by the three Powers in question and to this the United States was invited to give adherence. Mr. Seward declined,[105] but indicated that the United States would not interfere as long as the provisions of the convention were observed.

In the latter months of the year 1861 the squadrons of the three Powers sailed to Vera Cruz and seized that port, but before any further definite operations were entered upon both the English and Spanish forces withdrew.[106] The intention of the French had become apparent, and the other governments refused to identify themselves with this policy. A treaty was made between Great Britain and Mexico but was

[100] Malloy, Treaties, etc., of U. S., Vol. I, p. 302.
[101] So Mr. Arias in this JOURNAL for October, 1913.
[102] Moore, Arbitrations, Vol. II, p. 1369.
[103] 52 Br. & For. St. Pap., pp. 272–87.
[104] *Ibid.*, 392.
[105] 51 Br. & For. St. Pap., p. 63.
[106] House Doc., 100, 37 Cong. 2 sess., p. 1187.

not ratified.[107] A convention of 1866 finally settled the question in favor of Great Britain.[108]

Such, in brief, are the outlines of the intervention in Mexico as far as it affected the problem with which we are concerned. The French claims were not for injuries to aliens, so we shall not discuss the period of French dominance in that country. It may be said, however, that although these claims of responsibility differed in kind and had perhaps a more forceful legal sanction than those which we are considering, yet at bottom many of the same principles are involved, and from this point of view the French intervention may be said to have had some effect upon the law of responsibility. At the same time we must remember that a great many other elements, especially political ones, were also involved in this dispute which in turn rob the incident of some of its international significance.

Another point which we may well consider at this point is the question of the influence of the Monroe Doctrine upon the attitude of the Latin American states. I know that there has been a general feeling that much of the indifference and even defiance of these states is based upon the idea that the Monroe Doctrine will afford them protection. Whatever are the virtues or defects of this doctrine, it is certainly true that on no occasion has the United States invoked it to protect the turbulent southern republics from being coerced into paying their debts. It is really inconceivable that the Latin American states could hope for a protection which has never been offered them. Of course, there may be some mystic moral force to the doctrine which has led European states to keep hands off when otherwise they would have intervened. But if this is so it has been incommensurable.

There is a single case recorded in which we have the interesting situation of a Latin American state claiming the responsibility of a great Power. This is the case of *Alleghanian*, an American ship loaded with guano belonging to the Peruvian Government. The ship was burned by Confederate forces in Chesapeake Bay. In a note of January 9, 1863, Mr. Seward rejected the claim on the ground that it was an act of treason and piracy which the United States had been unable to suppress al-

[107] 53 Br. & For. St. Pap., p. 573.
[108] 56 *Ibid.*, p. 7.

though it had been extraordinarily vigilant. There was no fault on the part of the United States. The claim was later brought before a joint claims commission but was rejected on the ground that it was a government claim and not that of a private citizen.[109]

The same commission which settled the *Alleghanian* claim also decided a number of claims in favor of the United States, against Peru, for injuries to its citizens in various revolutions. Again in 1871 [110] another settlement was made by the Peruvian Government for damages caused by the sacking of Callao in 1865 by the Pradist insurrectos. Two United States citizens were indemnified by this decree.[111]

In this same year the United States was also pressing a claim against Colombia for the seizure of the steamer *Montijo*, an American vessel, by a party of revolutionists in the State of Panama.[112] The Colombian Government denied its responsibility for losses to aliens through "common crimes." It prosecuted the offenders, but ineffectually. Finally, arbitration was resorted to in 1874 and the case was decided for the United States.

Two points of interest were raised in this dispute. First of all the Colombian Government asserted that it would not be held responsible for debts of the State of Panama because they were in this case private debts. The umpire refused to agree with this. He insisted that the debts were those of the federal government, not only because a violation of treaty privileges was involved, but also because they were clearly public in character. In a federal system, he said, constituent states were non-existent so far as foreign relations were concerned. The second point involved the fixing of liability. The officers of the Union had failed in their treaty and international law obligation to protect United States citizens. Clearly it was the duty of the President of Panama as agent of the government to recover the *Montijo*. "It is true," he said, "that they did not have the means of doing so. * * * but this absence of power does not remove the obligation. The first duty of every government is to make itself respected both at home and abroad.

[109] For facts *cf.* Moore, Arb., Vol. II, p. 1615 *et seq.*
[110] Moore, Arb., Vol. II, pp. 1629, 1652–7.
[111] VI Moore, Digest, p. 973.
[112] Moore, Arb., Vol. II, p. 1421; For. Rel. 1871, p. 230.

If it promises protection to whom it consents to admit into its territory it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make the amends in its power, *viz.*, compensate the sufferer."

Another case based on very similar facts was that of the Venezuelan Transportation Company.[113] This was an American corporation operating in Venezuela. Steamers of the company were seized during the course of an insurrection and serious losses incurred. The diplomatic correspondence in this case dragged on for some twenty years, and at one time war seemed imminent. In June, 1890, the President of the United States was empowered by joint resolution of Congress to take such measures as were necessary. Fortunately these measures were the entering into arbitration in favor of the United States. It may be noted that the Venezuelan Government strenuously combatted the claims of the United States, alleging that they were contrary to the principles of responsibility which the United States herself was at that time avowing.

In 1885 the United States and several other countries had occasion to claim the responsibility of Colombia.[114] We have seen that this state attempted to regulate the matter by decree. This was unsuccessful, and although almost thirty years have since passed no results have been reached.

We turn next to a series of important revolutions, beginning with the year 1891, which gave considerable impetus to the growth of international responsibility. In Chile a usurping president was deposed by the party supporting the Congress, but not without some rioting and bloodshed.[115] On August 8, 1892, the United States concluded a convention with Chile whereby claims were submitted to an arbitral tribunal. The claims were decided in favor of the United States. So, too, with the claims of England, France, Norway-Sweden and Italy. German claims were settled through diplomatic channels. The conclusion of these conventions would indicate that the Chilean Government did not refuse to regard itself as responsible and this was

[113] Moore, Arb., Vol. II, p. 1693 *et seq.*

[114] Sen. Doc. 264, 57th Cong. 1 sess.; 76 Br. & For. St. Pap., p. 566.

[115] Moore, Arb., Vol. II, p. 2117 *R. D. I. P.* XIX, p. 268.

in fact very clearly shown by the correspondence with the United States.[116]

A serious dispute arose between Venezuela and certain European Powers as a result of claims of responsibility following the civil war of 1892. The Venezuelan Government had established a special claims commission for payment of all requisitions of the *de jure* government. All claims were cognizable only by the high federal court, a plan which left to the Venezuelans the final determination of the same. A proposal to form an international commission was repudiated with such vigor that the diplomatic corps decided to bring pressure to bear, and to this end drew up a memorandum to which most of the interested parties became signatories. A change in the personnel of the corps overthrew these plans, and the *entente* was never formed. Italy, which opposed the plan, managed to effect a settlement on a basis of from five to thirty per cent.[117] The French claims were settled by a convention in 1902.[118] It is important to note that despite the settlement which was made with Italy, the Italian Government expressed itself very firmly as opposed to diplomatic intervention in affairs of this sort.

The following year occurred the revolution in Brazil which overthrew the empire.[119] The Brazilian Congress instituted a court of claims to take cognizance of claims of aliens, denying, at the same time, the right to resort to diplomatic intervention to effect these ends. Nevertheless, France, Spain, Germany, Austria-Hungary, Russia, Belgium and Denmark all secured recognition of their rights through regular diplomatic channels.

The claims of Italy were the most numerous of all. But, unfortunately for her cause, the Green Book, recently issued, in which she had so thoroughly disapproved of the use of diplomatic intervention, was seized upon by the Brazilian Government and used as ammunition against its author. The claims of Italy were presented on March 11, 1885, to the Brazilian Government, but the latter repudiated respon-

[116] For. Rel. 1892, p. 54.

[117] II *R. D. I. P.*, p. 45.

[118] Sen. Doc. 533, 59th Cong. 1st Sess. The Italian Government published compromising papers in a Green Book which led to recall of Venezuelan ministers in France and Belgium. France retaliated in kind.

[119] 4 *R. D. I. P.*, p. 403.

sibility for injuries resulting from acts of insurrectos, and, furthermore, what it was pleased to call *vis major*. A counter-proposition of the Brazilian Government was rejected, but after negotiation, the Italian and Brazilian ministers signed two protocols, one by which a mixed local commission was to settle certain claims; the other protocol submitted certain questions to arbitration by the President of the United States.

The protocols were submitted to the Brazilian Congress and while still in the stage of debate popular excitement broke forth in riotous anti-Italian manifestations and in the São Paolo some 65 persons were killed and wounded. The Italian Government, very much excited over these events, dispatched a flying squadron to Brazil and all emigration was forbidden. Despite these warlike manifestations, however, the whole matter was settled peacefully and the sum of 4,900,000 francs was granted in settlement of claims not otherwise regulated.

During the same civil war three French citizens were killed, and reparation was demanded by the French Government. Brazil replied with the much quoted note of October 9, 1893,[120] denying all liability but two years later 900,000 francs were paid the French Government by way of indemnity.

These cases, occurring in the years most fruitful of mob outbreaks, although they present many points of difference, notably in the acknowledgment of the right of diplomatic intervention, in result they have been the same. The indemnity has been paid and another acknowledgment of liability effected. We now turn to the celebrated Venezuelan intervention of 1902.

Most of the important European states had claims of responsibility against Venezuela, but those of Great Britain, Germany and Italy were the most numerous. The British claims included demands of reparation for the seizure of certain vessels as well as for injuries to its citizens in the recent uprisings. The Italian and German claims were similar in nature and included certain contract claims. The conflict was inaugurated by the presentation of a promemoria by the German Ambassador to the United States in which it was proposed to present an ultimatum and then resort to a blockade of Venezuelan ports.[121] It was not until

[120] *Archives Diplomatiques*, Vol. 48, ser. 2, p. 215.
[121] For. Rel. 1901, p. 193.

a year later that these proposals were carried into effect. Great Britain and Italy joined with Germany in the presentation of an ultimatum, December 7, 1902, and the following day diplomatic relations were severed. The events which followed are familiar. The Venezuelan gunboats were seized and a blockade of the Venezuelan coast was entered into, with the result that President Castro finally capitulated and in a note sent by the American Minister to the State Department, December 31, 1902, declared that he recognized in principle the claims of the allied Powers.[122] His proposal to arbitrate was accepted with certain reservations, and by February 16, 1903 the blockade was raised. Mixed commissions settled all questions but that of preferential payment, which was submitted to The Hague.[123]

Since the Venezuelan case, we have had two minor cases arising, that of Deebs against Colombia, which resulted in payment of indemnity for injuries sustained by him in a revolution, and again the final decision against Colombia in the Cerutti affair.[124] Doubtlessly, the recent Nicaraguan, Venezuelan and Mexican imbroglios will give rise to important claims of responsibility.

It remains for us to review the Latin American situation. On the whole, despite the monotonous reiteration of opinions of non-responsibility, the development has been steadily toward increasing liability. Statutory and constitutional provisions have alike proven unavailing to stem the tide of international progress and opinion, and the unusual number of cases resulting in an assumption of liability have furnished the law with tremendous precedent. It is difficult to prophesy what will be the future development in Latin America. It is not impossible that the increasing tendency to arbitrate will bring an adjustment of many former difficulties. Certainly, in view of the present attitude of the Powers, this method presents itself as the most satisfactory solution of an embarrassing situation. But whatever course the Latin American states may in the future pursue, they can hardly continue to repudiate the theory of responsibility, which is now an integral part of international law, without reflecting on their international prestige.

[122] For. Rel. 1903, p. 803. [123] *Ibid.*, p. 823.

[124] The question of responsibility was not important in this case.

V

In conclusion, I should like to say something about the development of the law of international responsibility in the practice of China and of the United States. My study of the cases involving these states is, unfortunately, not yet completed, but I may be able to indicate some of the general tendencies.

In China, outrages against aliens have been confined largely to mob violence based on a deep-seated anti-foreign sentiment. This feeling expressed itself originally in various forms of government oppression, especially during the eighteenth century, when the spoliations of Anglo-Saxon adventurers brought a reversal of the early pro-foreign policy of the government. The hostility of the ruling classes communicated itself to the populace, and mob outbreaks against foreigners began to occur with some regularity in the latter twenties of the nineteenth century, when European operations in China were still confined to the activities of the great mercantile companies. The growth of commercial relations with China seems rather to have enhanced than to have diminished the prejudices against aliens. And events like the Opium War of 1840, and again the campaigns which culminated in the treaties of Tientsin, cannot have increased the liking of the Chinese people for the alien intruders. Up to the time of the last mentioned treaties, the outbreaks were sporadic and acknowledgments of responsibility were invariable. The Chinese authorities, however, insisted that rules of international law were not for them. On the other hand, the European states were equally certain that only thus were the relations between Orient and Occident to be amicably adjusted. This was, of course, an unwarranted assumption, and the international law which was administered was much at variance with the principles which governed the relations among European states.

After the treaties of Tientsin the Europeanization of China proceeded more rapidly, but at the same time the anti-foreign sentiment, under the tutelage of secret political clubs, grew more aggressive, and, beginning with the fearful Tientsin massacre of 1870, we have a long series of almost annual outrages which culminated finally in the European intervention in the Boxer troubles. Next to the Venezuelan affair of

1903, there has been a no more pronounced and spectacular vindication of the international responsibility of states. Since 1900, however, there have been further instances of outrages upon aliens and it does not appear that any change is imminent.

I have already remarked upon the peculiar character of the international law which was administered in China in the early nineteenth century. This was due not only to the singular policy of aloofness insisted upon by the imperial government, but also to the fact that extended extraterritorial jurisdiction was exercised in China by all the important Powers. After the year 1858, these influences became of less importance, at least as regards the present problem, and the law of responsibility appears to have followed the same line of development as in other parts of the world. Indeed, the Chinese Government appears to have expressly recognized these principles when, on various occasions, it had reason to demand the responsibility of the United States for injuries sustained by its subjects, the result of mob outbreaks. We may, therefore, say that in general the principle of responsibility is firmly established in the international law which has developed from Chinese precedents.

We have already had occasion to observe in some detail the practice of the United States. Two facts stand out with some prominence; the United States has always been ready to press claims for injuries to its own citizens abroad, and has been uniformly successful in obtaining acknowledgments of liability; on the other hand, this same government has invariably repudiated the principle of responsibility when similar claims have been made upon it and in most instances an indemnity has been granted.

This same tendency we have noted elsewhere but in no state has it been so conspicuous as in our own country. This is due, perhaps, to the traditional belief that responsibility must first be denied before an indemnity may be paid. Most of the indemnities paid by the United States have been paid in this fashion and have been carefully classified as expressions of spontaneous liberality. Thus, the Spanish claims in 1850, the Italian lynching cases and the Chinese cases were all of this sort.

There is little excuse for the inconsistencies practiced by the United States. We have seen that indemnities once paid have invariably had

the effect of an expression of responsibility, no matter how they may have been limited or designated. This has also been the case in this country, and many of the cases which were settled on the spontaneous liberality principle have since been cited in support of the principle of absolute liability. The continuance of the policy of the United States does not reflect a great deal of credit on the statesmen who insist upon it and its only effect is to obscure the real international law.

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